

ST 98-31

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS

v.

“PHINEAS T. BLUSTER”, as Resp. Off.
of Howdy Doody Restaurant and Pancake
House,

Respondent

No. 97-ST-0000

NPL: 0000

IBT: 0000-0000

Christine O’Donoghue

Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. Marc Muchin, Special Assistant Attorney General for the Illinois Department of Revenue.
“Phineas T. Bluster”, appeared pro-se.

Synopsis:

This matter comes on for hearing pursuant to “Phineas T. Bluster’s timely protest of the Notice of Penalty Liability No. 0000 issued on October 26, 1994 for Retailers’ Occupation Tax liability. Such Notice of Penalty Liability was issued to “Phineas T. Bluster (hereinafter “Bluster” or the “taxpayer”) as a responsible officer of “Howdy Doody” Restaurant & Pancake House pursuant to Section 13.5 of the Retailers’ Occupation Tax Act. The issues to be resolved are 1) whether the taxpayer was a responsible officer of the “Howdy Doody” Restaurant and Pancake House and 2) whether the taxpayer’s failure to pay the tax due was willful.

Upon consideration of all the evidence, it is recommended that the Notice of Penalty Liability be finalized.

Findings of Fact:

1. The Department’s *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Notice of Penalty Liability, issued October 26, 1994, showing a total

liability due and owing in the amount of \$110,211.98 for the period of March, 1989 through September, 1989. Dept. Ex. No. 1.

2. “Bluster” signed the corporation’s 1988 annual report under penalty of perjury as president of the “Howdy Doody” Restaurant & Pancake House, Inc.. Dept. Ex. No. 2.
3. “Phineas T. Bluster” was listed as the vice-president/director of the “Howdy Doody” Restaurant and Pancake House on the Illinois Business Taxpayer Application for Registration, NUC-1. Dept. Ex. No. 3.
3. “Bluster” signed this NUC-1 and listed his title as director on January 29, 1987. Dept. Ex. No. 3.
- 4.** A letter from the Office of the Secretary State, dated May 4, 1989, indicates that the secretary of state refused to remove the taxpayer’s name as president of the corporation in spite of a request by taxpayer’s counsel. Dept. Ex. No. 2.

Conclusions of Law:

The Department seeks to impose personal liability on “Bluster” pursuant to Section 13.5 of the ROTA, which reads, in pertinent part:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon; The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. ...

35 ILCS 120/13.5.¹ (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 ½).

In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursal of funds. See, e.g., Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970). Liability attaches to those

¹ The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, provides for a personal liability penalty for taxes incurred as of January 1, 1994.

with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the Government. *Id.*

The Department established its *prima facie* case of personal liability against the taxpayer through the introduction of its Notice of Penalty Liability. 35 ILCS 120/13.5 (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 1/2); Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). Once the NPL was admitted into evidence, the burden shifted to the taxpayer to rebut the Department's *prima facie* case. *Id.*

The taxpayer claims he was not responsible for filing the tax returns nor remitting the tax to the Department. "Bluster" argues that he was not actively involved in the operations of the restaurant, he merely loaned the investors money to purchase the business. Tr. p. 12. Further, he contends that these investors took his money and never transferred the funds to the sellers, therefore, the sale was never completed. The taxpayer, however, has not offered any credible evidence to corroborate his contentions, in fact, the documentary evidence indicates that the taxpayer was the president of the corporation throughout the audit period. Nothing in the record rebuts the presumption that the taxpayer had the power and responsibility within the corporation for ensuring that the taxes were remitted.

For liability to attach under the statute, it must also be determined whether the taxpayer willfully failed to remit the retailers' occupation taxes due to the Department. Willfulness in regards to the statute is not merely limited to "intentional, knowing and voluntary acts". Monday, 421 F.2d at 1215. Willful conduct also encompasses a reckless disregard for obvious or known risks. *Id.* Furthermore, willful conduct does not require "bad purpose or an intent to defraud the government." The Department of Revenue v. Heartland Investments, 106 Ill. 2d at 29-30 (1985).

In Branson, 168 Ill.2d 247 (1995), the Illinois Supreme Court held that the introduction of the Notice of Penalty Liability was sufficient to establish a *prima facie* case of willful failure to pay retailers' occupation taxes. Thus, the burden is on the taxpayer to rebut the presumption created.

To meet this burden, the taxpayer's must present competent evidence. A. R. Barnes v. Department of Revenue, 173 Ill. App. 3d 826, 835 (1st Dist. 1988). Case law in Illinois clearly indicates that merely denying the accuracy of the Department's assessments does not overcome the Department's *prima facie* case. *Id.*; Mel-

Park Drugs v. Dept. of Revenue, 218 Ill. App. 3d 203 (1st Dist. 1991). The Department's determinations are rebutted only after a taxpayer introduces documentary evidence which is consistent, probable and identified with taxpayer's books and records, showing that the Department's determination is incorrect. A. R. Barnes & Co., *supra*. In the case at hand, the taxpayer has not successfully rebutted the presumption since the taxpayer has not offered any evidence to corroborate his contentions. The record does contain a letter from the Office of the Secretary State, dated May 4, 1989, which indicates that the taxpayer's counsel attempted to remove the taxpayer's name as president of the corporation. The secretary of state refused since the removal of the taxpayer's name would cause the annual report to be invalid which, in turn, would cause dissolution of the corporation. Dept. Ex. No. 2. This letter indicates that the taxpayer remained named as president until at least May of 1989, in fact, nothing in the record indicates he was ever removed as president. If the taxpayer was merely a passive investor as claimed, it would be unlikely that he would be listed as the president on corporate documents in the first place. Even assuming that taxpayer's counsel was attempting to correct the document, i.e., "Bluster" was not the president, there is no evidence which indicates he did not fulfill his corporate duties until that time. Nor is there any evidence which supports the taxpayer's claims that he was not involved in the payment of corporate creditors or the handling of corporate tax matters, regardless of his formal title during the time period.

Wherefore, the reasons discussed above, I find that the taxpayer has not successfully rebutted the Department's *prima facie* case, therefore, it is my recommendation that the Notice of Penalty be finalized as issued, inclusive of all interest as may be applicable as a matter of law.

Christine O'Donoghue
Administrative Law Judge